IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ADON ERNESTO GUZMAN, Appellant.	No. 37302-5-II UNPUBLISHED OPINION

Armstrong, J. — Adon Ernesto Guzman appeals his convictions for three counts of second degree assault, two with firearm enhancements; felony harassment; and unlawful possession of a firearm. He contends that (1) the State failed to prove his assault convictions because there was no evidence that *he* fired the gunshots; (2) his felony harassment and assault convictions should have been treated as the same criminal conduct for sentencing purposes; (3) his community custody plus his underlying sentences exceeded the statutory maximum punishment; and (4) his trial counsel was ineffective. We remand to the trial court to correct the scrivener's error in the judgment and sentence. In all other respects, we affirm.

FACTS

On March 10, 2007, Guzman and his girlfriend, Viola Olivares,[1] attended Ruben Reyes's 21st birthday party at the home of Raymond Reyes, Ruben's father, in Olympia.[2]

At some point, an altercation broke out inside the house between Guzman and another party guest. Guzman went outside, retrieved a gun out of Olivares's bag, and fired multiple shots

[1] Olivaras is also known as Aracelli.

[2] We refer to Raymond Reyes and Ruben Reyes by their first names for clarity.

into the air. Guzman then gave the gun back to Olivares to put in her bag.

Raymond subsequently moved Guzman into the house and tried to calm him down. In response, Guzman said he was going to put Ruben "in check," and then hit Raymond in the mouth, pushed Raymond down, and kicked him. Report of Proceedings (RP) at 92. Guzman was also yelling at Olivares to give him the "black bag." RP at 109. Raymond's daughter took him to the hospital where he was treated for a broken rib and a punctured lung. Raymond later found out that while he was at the hospital, Guzman was looking for him with the gun and had threatened to kill him. Raymond was afraid that Guzman would act on this threat because Guzman had attacked him and had a gun.

While Raymond was at the hospital, Jesus Zepeda, another party guest at Raymond's home, opened the front door and guest Jacob Murphy ran inside. As Zepeda opened the door, he saw Guzman standing outside. Bullets immediately came through the doorway, and one hit the television inside the home. Zepeda and Murphy ducked; they were not injured. Nobody saw Guzman actually fire the gunshots into the house. Daniel Ramos heard the gunshots and called 911.

After the police arrived, Guzman admitted firing a gun into the air, and when the police questioned him about what he did with the gun, Guzman asked the police if they had spoken with Olivares. Olivares's interview helped the police locate the gun and a crime lab confirmed that it was the same gun that had fired the shots at the home.

The State charged Guzman with drive-by shooting (count I), second degree unlawful possession of a firearm (count II), three counts of second degree assault while armed with a

firearm (counts III, V, and VI), and felony harassment while armed with a firearm (count IV). Counts III-VI included firearm enhancements. The jury found Guzman guilty of count II (firearm possession), counts III, V, and VI (assaults), and count IV (harassment). It also found the firearm enhancements on counts V and VI.

The trial court sentenced Guzman within the standard range to 16 months on counts II and IV, and to 33 months on counts III, V, and VI, with all sentencing running concurrently. The court also imposed 36-month firearm enhancements on counts V and VI and 18-36 months of community custody on each of the assault convictions. In one part of the judgment and sentence, the court added both firearm enhancements to count VI instead of adding one enhancement each to counts V and VI.

ANALYSIS

I. Sufficiency of the Evidence

Guzman maintains that there was insufficient evidence to support his convictions for assault with a firearm against Zepeda and Murphy because there was no evidence that he was the person who fired the gunshots into the house.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201. We "defer to the trier of fact on issues involving conflicting testimony, credibility of the witnesses, and the *persuasiveness of the evidence*." *State*

v. Hernandez, 85 Wn. App. 672, 675, 935 P.2d 623 (1997) (emphasis added).

A person is guilty of second degree assault when, under circumstances not amounting to first degree assault, that person "[a]ssaults another with a deadly weapon." RCW 9A.36.021(1)(c). Assault may be "'committed merely by putting another in apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm.'" *State v. Byrd*, 125 Wn.2d 707, 712, 887 P.2d 396 (1995) (quoting *State v. Frazier*, 81 Wn.2d 628, 631, 503 P.2d 1073 (1972)).

The evidence was sufficient for the jury to find that Guzman fired the gunshots into Raymond's house at Zepeda and Murphy. First, it is undisputed that Guzman had fired gunshots earlier that evening, that the same gun fired into the house, and that Guzman had access to the gun because it was in his girlfriend's bag. Guzman also asked Olivares to get the "black bag" during his altercation with Raymond and walked around Raymond's house asking where Raymond was, stating that he was "fucking dead." RP at 109, 112. Guzman had been in an altercation with another individual earlier in the night and had said that he was going to put Ruben "in check." Furthermore, when Zapeda opened the door to admit Murphy—who ran in telling Zapeda to duck—Zepeda saw Guzman standing outside. Gunshots were then immediately fired through the open door.

Taken in the light most favorable to the State, we find this evidence sufficient for the jury to conclude that Guzman fired the gunshots toward Zepeda and Murphy.

II. Offender Score

Guzman next argues that the trial court miscalculated his offender score because his

second degree assault and felony harassment of Raymond constituted the same criminal conduct and, thus, that his offender score should have been lower.

The State contends that Guzman waived this argument because he did not raise it at sentencing. We agree. *See State v. Beasley*, 126 Wn. App. 670, 685, 109 P.3d 849 (2005) (because same criminal conduct determination involves factual determinations and exercise of discretion, failure to raise issue at trial waives argument on appeal); *State v. Wilson*, 117 Wn. App. 1, 21, 75 P.3d 573 (2003) (failure to ask trial court to make same course of criminal conduct determination and failure to object to offender score waived right to raise the issue on appeal). But, even if we consider Guzman's argument, it fails on the merits.

A trial court may consider current convictions involving the "same criminal conduct" as one crime for sentencing purposes. RCW 9.94A.589(1)(a). Convictions will count as the "same criminal conduct" only when they (1) share the same criminal intent; (2) are committed at the same time and place; and (3) involve the same victim. *State v. French*, 157 Wn.2d 593, 613, 141 P.3d 54 (2006) (quoting RCW 9.94A.589(1)(a)).

The State concedes that the assault and criminal harassment of Raymond occurred at the same place (Raymond's house) and involved the same victim (Raymond). Thus, the question is whether Guzman had the same criminal intent for each crime.

Crimes may involve the same intent if they were part of a continuous transaction or involved a single, uninterrupted criminal episode. *State v. Deharo*, 136 Wn.2d 856, 858, 966 P.2d 1269 (1998) (quoting *State v. Porter*, 133 Wn.2d 177, 185-86, 942 P.2d 974 (1997)). But when a defendant has time to "pause, reflect, and either cease his criminal activity or proceed to

commit a further criminal act," and makes the decision to proceed, the defendant has formed a new intent to commit the second act. *State v. Grantham*, 84 Wn. App. 854, 859, 932 P.2d 657 (1997); *see also State v. Torngren*, 147 Wn. App. 556, 565, 196 P.3d 742 (2008) (assault not the "same criminal conduct" as the robbery because the criminal intent differed: the purpose of the assault was retribution for disrespect, which was independent of the robbery).

Here, Guzman had the opportunity to stop, reflect, and decide whether to proceed in committing the additional crime of felony harassment after he had physically assaulted Raymond. *See*, *e.g.*, *State v. Wilson*, 136 Wn. App. 596, 614-15, 150 P.3d 144 (2007) (new criminal intent formed when the defendant left the house for a short period of time after he completed a physical assault, but reentered the house to threaten to kill the victim with a piece of wood). After Guzman physically assaulted Raymond, Raymond left for the hospital. Guzman left the house. Gunshots were fired into the house, and Guzman then reentered the house looking for, and threatening, Raymond. Guzman had time to form a new criminal intent to commit felony harassment, and his crimes against Raymond did not constitute the same criminal conduct.

III. Statutory Maximum

Guzman contends that the trial court's imposition of community custody in addition to his underlying sentences, plus their firearm enhancements, exceeds the statutory maximum for second degree assault, which is a class B felony with a 120-month maximum sentence.[3] As stated, two of his three assault convictions contained firearm enhancements.

This court has a duty to correct an erroneous sentence. *In re Pers. Restraint of Call*, 144

[3] Guzman forms this as a due process and equal protection issue in his statement of additional grounds (SAG).

Wn.2d 315, 331-32, 28 P.3d 709 (2001). And "a court may not impose a sentence providing for a term of confinement or community supervision, community placement, or community custody which exceeds the statutory maximum for the crime." RCW 9.94A.505(5). Nor may a court impose a firearm enhancement that increases the sentence to exceed the statutory maximum. RCW 9.94A.533(3)(g). The trial court sentenced Guzman to 33 months' incarceration and 18-36 months of community custody for each assault conviction.[4]

When the following are added together, Guzman's confinement does not exceed the statutory maximum of 120 months: (1) the base sentence of 33 months, (2) the 36-month firearm enhancement, and (3) a maximum of 36 months' community custody.

Guzman's firearm enhancements for the two assault convictions run consecutively to each other and all sentences. When the 36-month firearm enhancement for his *second* assault charge is added to the base sentence, firearm enhancement, and community custody for his *first* assault conviction, the total confinement exceeds 120 months. Thus, the question is whether this imposes a sentence that exceeds the statutory maximum for the offense.

The Supreme Court resolved this issue in *State v. Thomas*, 150 Wn.2d 666, 80 P.3d 168 (2003). There, the defendant was convicted of multiple crimes, two of which had firearm enhancements. *Thomas*, 150 Wn.2d at 668. The trial court sentenced the defendant to a total of 13 years, which included 7 years for the longest base offense, 3 years for one enhancement, and an additional 3 years for the second consecutive firearm enhancement. *Thomas*, 150 Wn.2d at 669.

The *Thomas* court held that a trial court is not precluded from imposing a sentence that

[4] The community custody applies only to the assault convictions.

appears to exceed the statutory maximum for that offense only because of a second consecutive firearm enhancement. *Thomas*, 150 Wn.2d at 674. The court emphasized that the statutory provisions mandating firearm enhancements apply to the individual offense and that each firearm enhancement "did not result in an enhanced standard range sentence that exceeded the statutory maximum for *the* offense of second degree robbery. . . ." *Thomas*, 150 Wn.2d at 671. Under *Thomas*, despite that firearm enhancements for multiple crimes run consecutively, this does not improperly push the sentence for an individual offense above the statutory maximum. And so it is here. Guzman's sentence is proper because his base sentence for one assault conviction (33 months), plus a maximum of 36 months of community custody for that conviction, plus a 36-month firearm enhancement for that conviction does not exceed the statutory maximum of 120 months.

IV. Scrivener's Error

Nonetheless, Guzman's judgment and sentence incorrectly documents the sentence imposed because it applies both firearm enhancements to one count—count VI—when one of the enhancements should apply to count V. Although other parts of the judgment accurately apply the enhancements to counts V and VI individually, we remand to the trial court to correct the scrivener's error and change the confinement of 105 months for count VI to 69 months and change the confinement of 33 months for count V to 69 months. *See In re Pers. Restraint of Mayer*, 128 Wn. App. 694, 701-02, 117 P.3d 353 (2005) (citing CrR 7.8(a)) (clerical mistakes in judgments, orders, or other parts of the record may be corrected by the court at any time).

V. Ineffective Assistance of Counsel

Guzman contends that his counsel was ineffective by failing to object to his offender score and by not arguing that his sentence exceeded the statutory maximum. In his SAG, Guzman further contends that his counsel was ineffective because he did not call certain witnesses or prepare witnesses for cross-examination.

Both the federal and state constitutions guarantee criminal defendants effective assistance of counsel. *See* U.S. Const. amend VI; Wash. Const. art. I, § 22; *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To demonstrate that counsel ineffectively represented him, Guzman must show that (1) counsel's performance was deficient and (2) that the deficient performance prejudiced him. *State v. Hicks*, 163 Wn.2d 477, 486, 181 P.3d 831, *cert. denied by*, *Bubbs v. Washington*, ____ U.S. ____,129 S. Ct. 278, 172 L. Ed. 2d 205 (2008) (citing *Strickland*, 466 U.S. at 687). Counsel's representation is deficient when it falls below an objective standard of reasonableness. *Hicks*, 163 Wn.2d at 486. The defendant is prejudiced when, but for the deficient representation, there is a reasonable probability that the trial outcome would have differed. *Hicks*, 163 Wn.2d at 486. We defer to trial counsel's strategic decisions and begin our analysis by presuming that counsel was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). We need not address both prongs of the analysis if we find that either one fails. *Strickland*, 466 U.S. at 679.

Guzman cannot meet the first prong of the *Strickland* test because, as explained above, the trial court properly calculated his offender score and his sentences do not exceed the statutory maximum. Furthermore, Guzman fails to articulate how his attorney's failure to interview certain witnesses or have them testify impacted his case.[5] He also fails to set forth adequate facts

[5] Guzman does contend in his SAG that the witnesses would reveal that Raymond slipped and that

showing that his attorney was deficient by failing to prepare or by having a "lack of interest" in his case. SAG at 7-8. Because our record does not include any facts in support of these arguments, we cannot address them. RAP 9.2(b).

VI. Merger

Finally, Guzman argues that the trial court should have merged his felony harassment and assault convictions based on his conduct toward Raymond.

Under the merger doctrine, when separate criminalized conduct raises another offense to a higher degree, the court presumes that the legislature intended to punish both offenses only once through a greater sentence for the more serious crime. *State v. Freeman*, 153 Wn.2d 765, 772-773, 108 P.3d 753 (2005). The merger doctrine does not apply here because Guzman's assault charge was not elevated to second degree because of the harassment. The physical assault while armed with a firearm was independent of Guzman's verbal threats while armed with a firearm. Nevertheless, Guzman suggests that the sentences violate double jeopardy.

Guzman relies on *State v. Leming*, 133 Wn. App. 875, 138 P.3d 1095 (2006), for the proposition that his felony harassment and second degree assault convictions violated double jeopardy. In *Leming*, the court did not address whether the merger doctrine applied, but it did hold that the same convictions violated double jeopardy under the same evidence rule. *Leming*, 133 Wn. App. at 891. Under the same evidence rule, when the State has to prove the same facts for both crimes and the evidence would have been sufficient to warrant a conviction for both crimes, double jeopardy is violated. *Leming*, 133 Wn. App. at 889 (citations omitted). The

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Guzman did not cause Raymond's injury. But this is contrary to the undisputed evidence that Guzman assaulted Raymond by hitting and kicking him.

defendant in *Leming* had verbally threatened the victim during the same altercation in which he physically injured her. *Leming*, 133 Wn. App. at 879-80. The court found that the State had to prove the same facts for both crimes because the defendant's second degree assault charge required the State to prove that he assaulted the victim "with intent to commit a felony, to wit: felony harassment. . . ." *Leming*, 133 Wn. App. at 889 (emphasis omitted). Thus, finding felony harassment was a necessary element to the second degree assault finding in that case. Here, on the other hand, the facts necessary to prove second degree assault and felony harassment are independent of each other because they arose from separate incidents. To support Guzman's second degree assault charge, the State proved that he physically assaulted Raymond but not that he committed felony harassment. Thus, *Leming* does not apply and the two convictions do not violate Guzman's double jeopardy rights.

We remand to the trial court to correct the scrivener's error in the judgment and sentence. In all other respects, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Bridgewater, P.J.

Hunt, J.